

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN JIM SHOCKLEY**, on January 30, 2003 at 8 A.M., in Room 137 Capitol.

ROLL CALL

Members Present:

Rep. Jim Shockley, Chairman (R)
Rep. Paul Clark, Vice Chairman (D)
Rep. Jeff Laszloffy, Vice Chairman (R)
Rep. George Everett (R)
Rep. Tom Facey (D)
Rep. Steven Gallus (D)
Rep. Gail Gutsche (D)
Rep. Christopher Harris (D)
Rep. Michael Lange (R)
Rep. Bruce Malcolm (R)
Rep. Brad Newman (D)
Rep. Mark Noennig (R)
Rep. John Parker (D)
Rep. Holly Raser (D)
Rep. Diane Rice (R)
Rep. Scott Sales (R)
Rep. Ron Stoker (R)
Rep. Bill Thomas (R)

Members Excused: None.

Members Absent: None.

Staff Present: John MacMaster, Legislative Branch
Lisa Swanson, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 331, 1/23/2003; HB 393,
1/24/2003

Executive Action: None

HEARING ON HB 393**Sponsor:** REP. MARK NOENNIG, HD 9, Billings**Opening Statement by Sponsor:**

REP. NOENNIG opened on HB 393 stating that this bill prevents railroad employees from pursuing a claim in court which is covered in their collective bargaining agreement (CBA). He outlined some of the history. He stated that prior to 1903, the common law, fellow servant, doctrine was used which allowed employers to avoid liability for the torts of their employees. In 1903 the doctrine was eliminated which made the employer responsible for the acts of employees. In 1908, Congress enacted the Federal Employee Liability Act which covered injury claims of railroad employees involved in interstate commerce. In 1909, the Dillon case affirmed statutes eliminating the fellow servant doctrine. In 1915, the Worker's Compensation Act was passed in Montana. In 1926, Congress enacted the Railway Labor Act (RLA) which called for dispute-resolution of grievances between railroads and labor unions. In 1987, Montana passed the Wrongful Discharge Act. He explained that the Wrongful Discharge Act covered railroad employees who were wrongfully terminated as long the claims were not covered in the collective bargaining agreement. Then in 2000, came the Winslow case. He explained that Winslow was a railroad case in which Mr. Winslow made a claim under his grievance procedure; was dissatisfied with the outcome, and filed a lawsuit. The Montana Supreme Court ruled in Mr. Winslow's favor stating he was entitled to do that.

{Tape: 1; Side: A; Approx. Time Counter: 1 - 48}

REP. NOENNIG explained that a railroad employee should not get two bites of the apple. If there is a CBA, it should be followed. He stated HB 393 preserves all common law claims but eliminates claims which are covered by CBA.

He explained that in a CBA, both sides agree to abide by it with each side giving up something. He stated that if an employee does not like the outcome of the Agreement, they can still go to court but the claims would be limited to the Railway Labor Act and the procedure in the Agreement.

{Tape: 1; Side: A; Approx. Time Counter: 51 - 81}

REP. NOENNIG stated that this bill does not limit any claims which the CBA does not cover. He emphasized that it preserves all common law and statutory claims, as long as they are not

covered by the CBA. He stated he has been getting a lot of emails asking him to not pass HB 393. He stated that his constituents are concerned that passing HB 393 would eliminate their ability to pursue claims not covered under the Agreement. He stressed that is simply an incorrect interpretation of what HB 393 would do. He summarized that HB 393 would only eliminate claims covered by the Agreement.

{Tape: 1; Side: A; Approx. Time Counter: 82 - 111}

Proponents' Testimony:

Tom Walsh, Vice President, Montana Rail Link (MRL), supported HB 393. He stated he has been with MRL since 1987. He stated it employs 900 employees, 90 percent of whom are members of unions. He stated that the Unions, of which the 90 percent belong, encompass the Brotherhood of Locomotive Engineers, Maintenance of Way, Signal Electricians, Clerical, Laborers, and Machinists. He believed that all MRL employees are treated equally. He explained that whether a person is in management or a union, everyone has the same health and life insurance, profit sharing plan, and a voice in MRL safety efforts. He stressed that the impact of the 2000 Court decision, has caused MRL to spend a great amount of time and money defending itself. He stated in the last year alone, MRL spent a million dollars and will spend about \$1.5 million next year. He stated if the law does not change, MRL will pay more every year in litigation costs. He emphasized that MRL values fairness, responsibility, and integrity. He stressed that the process has been used for over 75 years and is fair. He asked the Committee to pass HB 393 in order to clarify the grievance process and restore balance between MRL and its employees. He stressed that Montana needs to be consistent with the other states. He explained that Montana is the only state which handles the process this way and it needs to change.

{Tape: 1; Side: A; Approx. Time Counter: 112 - 195}

John Grewell, Switchman, MRL, supported HB 393. He stated that he supports the union concept and has negotiated contracts for MRL. He explained the CBA process. He stated he has sat down with labor unions in the CBA process. He explained that when a CBA is reached, members get to decide whether they want to vote for it. He emphasized that if the members sign the agreement, which is to ratify it, then it becomes a binding contract. He stated that the contract has a grievance procedure within it which outlines the process to be followed in the event of a grievance. He explained that the current problem is that an employee may go outside the agreement and sue MRL. He stated

that opponents will make accusations that the grievance procedure is a "kangaroo court." He stated that is not true; that the process is fair. He urged a do pass.

{Tape: 1; Side: A; Approx. Time Counter: 196 - 238}

Perry Smith, MRL Locomotive Engineer, Missoula, supported HB 393. He stated that he is a member of the Brotherhood of Locomotive Engineers. He stated that HB 393 will not affect the Federal Railway Labor Act, the Federal Employees Labor Act (FELA), or the Collective Bargaining Agreements. He emphasized that MRL is a small, short-line railroad and if it suffers, MRL employees will suffer. He urged a do pass on HB 393.

{Tape: 1; Side: A; Approx. Time Counter: 239 - 301}

John Caswell, MRL Locomotive Engineer, Missoula, supported HB 393. He stated that he supports and agrees with Perry Smith's testimony.

Fred Tullie, MRL Signal Inspector, supported HB 393, appearing on his own behalf. He believed that if the bill does not pass it will negatively affect MRL.

{Tape: 1; Side: A; Approx. Time Counter: 302 - 316}

Pat Ricci, MRL Engineer, Missoula, supported HB 393. He stated he is a third generation MRL employee. He stated that this bill would strengthen the labor laws.

Greg Gagnelius, Maintenance of Way, MRL, Trout Creek, supported HB 393. He felt most concerned about keeping good faith between railroads and unions.

John Dorsey, MRL Locomotive Engineer, supported HB 393. He emphasized that CBA's are fair and give employees five chances to resolve disputes. He posed that if this bill does not pass it will cause a great financial burden to MRL.

{Tape: 1; Side: A; Approx. Time Counter: 317 - 364}

Randy Jensen, MRL, Helena, supported HB 393. He stated he has worked in the railroad business for 30 years and has witnessed a great number of disputes resolved by the CBA process. He urged a do pass HB 393.

Steve Jones, MRL, Billings, supported HB 393. He stated that if HB 393 were "anti-union," he would not be supporting it. He urged a do pass.

{Tape: 1; Side: A; Approx. Time Counter: 365 - 395}

Maggie Magdalena-Jacobson, Advocate for Collective Bargaining and the Railway Labor Act, supported HB 393. She stated she has 40 years of experience in the labor relations field. She stated that she began her career representing flight attendants. She started out as a stewardess with a grievance, which made her appreciate her labor organization. She outlined how she moved up through the ranks from Grievance Chairman, to Local Chairman, to Master Chairman, on up to Secretary-Treasurer of the National Flight Attendant's Association. She stated she represented 20,000 flight attendants back in 1960. She then served as Labor Relations Manager for a company in the airline industry. She stated that she went to the Federal Mediations and Conciliation Service. She explained that CBA's have survived and that Labor Unions help create a middle class. She emphasized that the CBA's ensure due process for all parties. She stated that the earliest railroad union was in 1934 to help widows and kids of railroad workers. She emphasized that labor organizations advocate for approximately 300,000 individuals in the industry and that 85 percent of these people belong to a Union.

{Tape: 1; Side: B; Approx. Time Counter: 179 - 394}

Randy Cox, Attorney, Boone, Carlberg, and Schooner, Missoula, supported HB 393. He stated that he represented MRL and Burlington Northern Railroad since the mid-1980's. He explained that cases are brought under 39-2-703. He stated that Winslow type claims allow railroad employees to go through the dispute-resolution procedure, then the court procedure. He stated that HB 393 would preclude employees from getting two bites at the apple. He explained that this bill would not touch FELA and would limit railroad workers to dispute-resolution for claims covered under the CBA. He explained that HB 393 would reinforce the CBA. He stated that the CBA does provide an employee a jury of their peers; that the process is not a "kangaroo court." He urged a do pass.

{Tape: 1; Side: B; Approx. Time Counter: 394 - 524}

Geoff Hedger, Attorney, Hedger-Moyers Law Firm, Billings, supported HB 393 on behalf of Burlington Northern Railroad Santa Fe (BNRSF). He stated that without this bill, MRL is subject to open-ended litigation. He emphasized that Montana is the only State that ignores the FRLA by allowing people with CBA's, to go outside of them, by bringing suit in court.

{Tape: 1; Side: B; Approx. Time Counter: 525 - 579}

Opponents' Testimony:

Fran Marceau, United Transportation Union, opposed HB 393. He stated that it is wrong to give citizens of Montana less rights and protection under the law, because they belong to a union. He urged the Committee to keep 39-2-703. He stated that FELA is only a remedy for personal injuries which occur on the railroad. He emphasized that this bill would change 39-2-703 which currently allows MRL employees to sue for negligent misconduct. He cited Winslow as a negligent mismanagement case involving the railroad's investigation process. He urged a do not pass on HB 393.

{Tape: 1; Side: B; Approx. Time Counter: 574 - 665}

Eric Thueson, Attorney, Helena, opposed HB 393. He stated that he represented Mr. Winslow for seven years. He read a letter written by his client, Mr. Winslow, which stated,

"MRL has called me a liar, a cheat and a swindler. They have tried to ruin my reputation and taken away my quality of life. I am 62 years old and I should be looking forward to retirement. Instead, I'm fighting to have a decent income. My job was taken away by a one-sided, kangaroo court, conducted by Montana Rail Link. This is what the Railroad says is adequate for the working man. We need more protection than that. That's why the railroad is trying so hard to get it away from us. This law has been in existence for many years to protect working men. Please give all railroad workers the protection they deserve by voting against and tabling HB 393."

EXHIBIT (juh20a01)

{Tape: 2; Side: A; Approx. Time Counter: 1 - 22}

Mr. Thueson stated that the grievance process under the CBA does not protect the rights of railroad workers because the company has all the power and can abuse the process. He stated that every grievance process begins with a disciplinary hearing. He emphasized that there is no impartiality afforded to the employee at the disciplinary hearing. He stressed that the prosecutor, judge and jury are all the same company official. He gave some background on the Winslow case. He stated that Gary Winslow had a hernia which did not affect his ability to work for MRL. In 1995, however, the hernia became inflamed for the first time when Mr. Winslow threw a switch. Mr. Winslow reported his injury to the company and sought medical help. MRL then fired him alleging that he was trying to defraud the company of benefits reserved

for workplace injuries. Mr. Winslow's treating physicians, including his surgeons, testified that his hernia, and its aggravation at work in 1995, were caused by the work he did for MRL. **Mr. Thueson** stated that Mr. Winslow felt his firing was a "pretext" designed to discourage workers from filing personal injury reports.

Mr. Thueson stressed that capital punishment is when you take away a man's livelihood. He stated that if MRL is successful in emasculating the railroad mismanagement statute, then Montana citizens, like Mr. Winslow, will be deprived of an opportunity to a fair trial of their most basic right. He closed stating that the grievance process cannot be equated with a fair trial, with an impartial judge. He stated that all Montana citizens are entitled to a trial by jury; that it is an inviolate right which you are born with. He stated that MRL employees have this right too, but if the Committee passes HB 393, the Montana Constitution will have to be changed to say "except railroad workers." **Mr. Winslow**, through his attorney, asked the Committee to vote "no" on HB 393.

EXHIBIT (juh20a02)

{Tape: 2; Side: A; Approx. Time Counter: 23 - 106}

Craig Gilchrist, Glasgow, Chairman of the Brotherhood of Locomotive Engineers (BLE), opposed HB 393. Mr. Gilchrist stated that he asked Mr. Ross, the BLE General Counsel, his professional opinion of HB 393 and how it would affect MRL employees. Mr. Gilchrist read the following letter he received from Mr. Ross:

"Mr. Gilchrist, regarding HB 393 . . . it tends to eliminate any cause of action against a railroad employer for negligent mismanagement, in the handling of an employee termination which is independent of the interpretation and application of the Collective Bargaining Agreement. In short, this bill appears to be an attempt to void the ruling of the United States Supreme Court in Hawaii Airlines v. Norris, 512 U.S. 246 (1994). Norris and several other cases permit employees to file causes of actions for statutory violations. Obviously the passage of this bill would not benefit the members of the Brotherhood, nor railway employees in Montana, because it would negate the employee's ability to pursue traditional avenues for appropriate cases. For that reason, I stand before you today and ask for your vote against HB 393. I am not an attorney, nor an expert in the Railway Labor Act. There are others here who have more expertise than I. . . In closing, I want it to be perfectly clear, the official position of the Brotherhood of

Locomotive Engineers is in opposition to HB 393. When there is fair treatment for railway employees, by their employers, this bill will sit on the books and collect dust. I ask for your help to keep fairness in the railroad working place and vote against HB 393. Thank you."

{Tape: 2; Side: A; Approx. Time Counter: 100 - 143}

James T. Muler, Transportation Communications Network Union, Butte, opposed HB 393. He spoke about a case, Mike v. Harrigan Apple Orchards, which addressed the Fellow Servant rule. Mr. Muler emphasized the absurdity of some proponent's testimony which essentially stated that Montana is the "dirty rat" that is hurting MRL. He submitted that Montana is not the only state that has a law which gives railroad employees the same rights as other citizens. He stated Nevada has a similar and better law than Montana.

EXHIBIT (juh20a03)

{Tape: 2; Side: A; Approx. Time Counter: 144 - 235}

Steve Nei, Former MRL Employee, broke his ankle while working the night shift for MRL. He stated he reported the injury to his supervisor who accused him of lying. He was forced to walk around on his injured ankle for one hour to look for the rock which caused his injury. He had three surgeries and after healing, took a job with MRL for lower pay. He hired an attorney, Jim Shea, on a personal injury claim against MRL under FELA. He explained that a week after his deposition was taken, MRL officials and security guards came to his home to inform him that he was being investigated for alleged dishonesty regarding prior injuries: seasonal depression, and chemical dependency treatment which he voluntarily sought eight years prior to his injury. He stated that all this information was provided to MRL, by his attorney Jim Shea, in the discovery process.

Mr. Nei stated that MRL fired him, and by a letter dated November 27, 2000, MRL wrote that he would not be rehired. Shortly thereafter, the Winslow decision came down and MRL offered him his job back. He explained the stress of being out of work for seven months with a family to support. He stated that if it wasn't for Montana's Negligent Mismanagement statute, he would still be out of work; waiting for an arbitration official to decide his fate. He urged a do not pass HB 393.

EXHIBIT (juh20a04)

{Tape: 2; Side: A; Approx. Time Counter: 236 - 337}

Robert Osler, Chairman of the Brotherhood of Maintenance of Way, Whitefish, opposed HB 393. He stated that he has 35 years in the railroad industry. He stated that the BN system is adamantly opposed to HB 393. He explained that this bill would take away the rights of people and expose them to harm. He posed that if a railway employee were wrongfully discharged, they would not have recourse if HB 393 passed. He stated that when an employee gets injured on the job, there is an effort in the company to get rid of them. He stated that MRL used to have a fast track in arbitration but that now it takes up to three years to settle disputes. He stated that a guy can get pretty hungry after three years.

{Tape: 2; Side: A; Approx. Time Counter: 338 - 438}

REP. BILL WILSON, Great Falls, opposed HB 393. He explained that he was a locomotive engineer for 25 years and that during that time, MRL investigated him on two occasions. He spoke of the MRL investigations and how at the time, he felt the deck was stacked against him; that he was better off admitting fault and signing the waivers. He explained that MRL will offer employees their jobs back on a leniency basis which, right or wrong, employees waive their rights to challenge MRL under the FRLA. He stated this bill takes away another avenue that the employees have. He stated mismanagement is real and the employees have no real recourse other than to go through the FRLA. He stated the initial grievance process is a "kangaroo court," and is heavily stacked in management's, not labor's, favor.

{Tape: 2; Side: B; Approx. Time Counter: 233 - 287}

Jerry Driscoll, Executive Director, AFL-CIO, opposed HB 393. He stated that this bill should be tabled.

{Tape: 2; Side: B; Approx. Time Counter: 288 - 294}

Stephanie Downard, opposed HB 393. She read from a letter written by Vivian Dias, former legislative representative for the BLE:

"I urge you to not pass this bill. This bill would adversely affect all employees fired by companies for any reason. The proponents of this bill will have you believe that other means of arbitration are available to the fired employee. The present arbitration process available to fired employees puts too much of a financial burden on the average employee and his family. Such process, at present, takes several months, if not years, and it also does not permit the employee to be represented fairly. . . . If you

believe in the American system of justice, and believe it to be fair and equitable, please give our employees their day in court to be heard and judged by his peers. Please do not allow the proponents of this bill to subvert the American system of justice under any guise. Thank You."

EXHIBIT(juh20a05)

{Tape: 2; Side: B; Approx. Time Counter: 294 - 362}

Brent Haux, MRL Employee, opposed HB 393.

Keith Ellen, VP, AFL-CIO, Representing International Brotherhood of Electrical Workers, opposed HB 393. He stated he represents over 100 railroad workers throughout Montana. He urged the Committee to table the bill.

{Tape: 2; Side: B; Approx. Time Counter: 363 - 381}

Alan Woodwick, Havre, BNSF, opposed HB 393. He stated this bill is a ploy by management to avoid accountability and to shirk their responsibility. He felt this bill is bad for Montana and for Montana workers.

{Tape: 2; Side: B; Approx. Time Counter: 382 - 400}

Robert Michalson, opposed HB 393. He explained that FELA is a long, drug-out process and that this is a bad bill. He asked the Committee to please throw it out.

Mike McNellis, MRL Employee, opposed HB 393. He stated he was involved in the train wreck at Carroll College in 1989. He suffered ear damage and needed to see an ear specialist. He stated he was accused, after a shift, of kicking a door and cracking the glass. He stated that MRL conducted a fact finding; that one MRL official acted as judge and jury. He stated that he was fired without due process; without a confession or an eye witness. He asked the Committee to mow down HB 393.

{Tape: 2; Side: B; Approx. Time Counter: 401 - 449}

Don Helander, Whitefish, opposed HB 393. He stated he beleived in the judicial court system and the last thing that needs to be done is to tip the scales in favor of corporations over citizens. He stated, "Please vote to kill this bill and retain the rights of our citizens."

EXHIBIT(juh20a06)

{Tape: 2; Side: B; Approx. Time Counter: 450 - 480}

Bob Corrigan, BNSF, Great Falls, opposed HB 393. He stated that he has worked in the railroad industry since 1970. He asked the Committee not to punish him for being a railroad employee. He urged a do not pass.

{Tape: 2; Side: B; Approx. Time Counter: 480 - 509}

Wayne Young, Assistant Legislative Director for the Brotherhood of Maintenance of Way Employees, opposed HB 393. He stated that he was unjustly dismissed from the BN railroad. He explained that it is drastic on your finances and your self-esteem. He felt the RLA does not work because it takes three years to make your way back and nobody can afford that. He stated that this bill would force employees who are treated negligently to go through the RLA. He urged a do not pass.

David Paoli, Trial Lawyer, Missoula, opposed HB 393. He stated that he represents railroad workers. He submitted a letter from Jeremy Fabich which he passed out to the Committee. He asked the Committee to vote against the bill on behalf of the Jeremy Fabiches, the Steve Neis, the MRL workers who testified in favor of the bill, and MRL employees who are too intimidated to testify against this bill; the employees who are in fear of losing their jobs if they speak against HB 393. **Mr. Paoli** wished to read a letter written by J.R. Jones who wanted to testify but who had to work. Mr. Paoli read the following:

"I have been a member of the Brotherhood of Locomotive Engineers since 1967 and I have two sons who are employed by Montana Rail Link. I am very concerned about them and the other railroad workers who have to face less than favorable conditions everyday. Please don't take away their rights. Any person who thinks that a union collective bargaining agreement, alone, will hold the parties accountable for mismanagement, negligence, and various forms of misconduct, is living in a dream world. We need to retain our laws that protect workers' rights."

Mr. Paoli asked the Committee to vote against HB 393 so that tomorrow, when J.R. Jones gets off the train, he will not be met by Mr. Gruell and some security guards to take his job away.

EXHIBIT (juh20a07)

{Tape: 2; Side: B; Approx. Time Counter: 510 - 594}

Russ Yerger, Attorney in Billings, opposed HB 393 at the request of Fran Marceau. He explained that from 1989 until 1998 he was the Assistant Regional Counsel for the BN Railroad. He stated that part of his job was to defend FELA and RLA actions. He emphasized that in his experience, railroads abuse the investigative process contained in the CBA. He stated that railroads use the process as a management tool to intimidate and harass workers. He claimed that railroads believe that if a worker can be fired, then the future wage loss claim under FELA can be cut off. He posed that if MRL would act reasonably and ethically while conducting employee investigations, there would be no problem. He stated that as long as railroads continue to harass and intimidate the workers, then 39-2-703 should remain on the books to keep management's power in check. He urged the Committee to oppose the bill.

{Tape: 2; Side: B; Approx. Time Counter: 595 - 641}

Julianne Burkhardt, Attorney with Thueson and Lamb, Helena, opposed HB 393. She submitted three documents. The first was a collection of letters from MRL employees who could not be at the Hearing; the second document contained portions from Gary Winslow's depositions; and the third document listed other States which support Winslow type claims.

EXHIBIT(juh20a08)

EXHIBIT(juh20a09)

EXHIBIT(juh20a10)

{Tape: 2; Side: B; Approx. Time Counter: 642 - 680}

Chey Ann Butler, Paralegal, Libby, opposed HB 393. She stated she has interviewed over 100 current MRL employees. She explained that many people are afraid of their railroad employers. She stated many people wanted to talk to her about problems they were having but they were scared. She stated they worried they would lose their job if management discovered they spoke with her. Some of the people she spoke with have friends and family who work for MRL and they feared if they said anything, they may jeopardize their jobs. She emphasized that former MRL employees talked with her stating that a person could get fired for expressing concerns about working conditions. Her sense was that MRL workers are frightened to death that if they displease MRL management, in anyway, it could cost them their jobs. She emphasized that MRL employees need legal protection. She asked the Committee to please oppose HB 393.

EXHIBIT(juh20a11)

{Tape: 2; Side: B; Approx. Time Counter: 681 - 725}

Jim Shea, Attorney, Paoli and Shea, Missoula, opposed HB 393. He has represented railroad workers since 1993. He stated that although the RLA may have been used as a shield at its inception, it is now being used as a sword against employees; a sword of intimidation and harassment. He stated that he represented Steve Nei. He stated he was not allowed to speak at the arbitration hearing and was basically forced to sit like a potted plant. Mr. Shea stated the real value of the current statute, is that it urges MRL management to treat their employees with dignity and respect. He urged a do not pass HB 393.

{Tape: 3; Side: A; Approx. Time Counter: 1 - 31}

Bob Pavlovich, Lobbyist for Montana International Brotherhood of Electrical Workers, opposed HB 393. He asked that the bill be tabled.

Al Smith, Montana Trial Lawyer's Association (MTLA), opposed HB 393. **Mr. Smith** stated that it is all in the railroad's hands on whether they go to court. He emphasized that if the railroad treated employees fairly, there would not be any need to go to court. He emphasized that if the railroads continue to treat employees as they have in the past, then they should go to court.

{Tape: 3; Side: A; Approx. Time Counter: 32 - 49}

Informational Testimony: None

Questions from Committee Members and Responses:

The Committee asked questions about the purpose of the FELA.

Maggie Jacobson responded it is more of a quasi-judicial function. She stated that she is not a FELA expert, nor does she get involved in it.

REP. RICE asked Randy Cox about losses that have been filed with the railroad. **Mr. Cox** responded that there are six or seven Winslow type lawsuits filed. He explained that they vary with some arising from termination of employment, some from handling of specific issues such as medical; whether benefits were paid, and others from working conditions. He felt that some of those issues could have been dealt with in the CBA while others were outside it. He explained he is not an expert in grievance procedures. He stated that, generally, when there is a fact finding, the Railway Labor Act and the CBA carry specific procedures to be filed such as notice and a place for the

hearing. He stated that a decision is made then, if requested, an appeal to the arbitration board. **REP. RICE** expressed her concern over proponent's testimony that the judge, jury and prosecutor are all the same company official. **Mr. Cox** stated that it is important to understand that it is not the end of the process. He stated the hearing is held because the employee is charged with violating company rules. He stated the company officer makes a determination on the facts. The official makes a recommendation to the highest ranking official on the labor/management side, to either censure, suspend or terminate the employee. It can then go to an arbitration proceeding which is not closed. He emphasized that an employee may have legal counsel at the arbitration hearing. He stated that if the arbitration hearing does not satisfy the employee, the employee may go to federal court.

{Tape: 3; Side: A; Approx. Time Counter: 50 - 120}

REP. SALES asked how employees dealt with management prior to Winslow, for the past 75 years. **Fran Marceau** stated the current bill is not necessary. His personal experience at BNSF is management has gone out of their way to ensure the process does not work which is why attorneys have had to get involved. **Mr. Marceau** responded that it was not very good but that the process was working, but now it is not.

{Tape: 3; Side: A; Approx. Time Counter: 121 - 258}

REP. SALES asked Mr. Smith about Mr. Nei's and Mr. Hauck's cases. **Mr. Smith** responded that MRL handled Mr. Nei's case very poorly; that they were very hard on him. He stated that MRL got defensive and heavy handed. He stated that Mr. Winslow was charged with falsifying an F27 and deceptive practices. He stated that Mr. Hauck's case did not involve an injury. He outlined the fact-finding process in the Winslow case.

{Tape: 3; Side: A; Approx. Time Counter: 259 - 329}

REP. STOKER asked Pat Keim about management's involvement in the negotiations process and issues regarding collective bargaining. He asked what attempts management has made to settle issues surrounding this bill. **Pat Keim, Director, Government Affairs, BNSF**, stated that he is not authorized to negotiate with union representatives. He stated that before each legislative session, he sits down with labor representatives to explain the legislation they would be proposing. He stated that he had not heard from any union representatives regarding this bill for this session. He stated he outlined this bill to Fran Marceau and asked Mr. Marceau his opinion of this bill. He stated that Mr.

Marceau got ahold of him a few weeks later stating that he would be opposing HB 393. **Mr. Keim** stated, at that point, he assumed there would be no negotiations regarding HB 393.

{Tape: 3; Side: A; Approx. Time Counter: 330 - 396}

REP. PARKER asked Mr. Thueson about the proponents' testimony that Montana is the only State which allows labor to get two bites at the apple. **Mr. Thueson** responded that statement is incorrect. He emphasized that Montana is not different from the rest of the States. He stated that Winslow follows the law of the land. He stressed that Winslow allows citizens to protect their rights in State court, even when covered by a collective bargaining agreement under the RLA. He stated MRL is wrong to misrepresent to the legislature that Winslow isolates Montana as the only place where a railroad employee can ignore the CBA and the RLA by suing their employer in court. **Mr. Thueson** outlined several cases, for the Committee, which preceded, but are similar to, the Winslow case. He cited Lingle v. Norge Div. Sky Chef, Inc., in which the U.S. Supreme Court ruled that Illinois citizens, covered by a collective bargaining agreement, may sue in state court when fired in retaliation for filing injury reports. He cited Hawaiian Airlines v. Norris, where an airplane mechanic was fired for refusing to sign an inspection report because he felt the plane he inspected was not safe. The airplane mechanic sued in state court under the whistle blower statute. **Mr. Thueson** explained the court's ruling that Hawaiian citizens, covered by a CBA under the RLA, may sue in State court for a retaliatory discharge. He stated that the Montana Supreme Court based Winslow on Norris. He stated Gary Winslow, and the airline workers, had collective bargaining agreements but filed under state law because they felt they were wrongfully discharged. He emphasized that every court recognizes that you do not give up state protections by becoming a member of a CBA.

{Tape: 3; Side: B; Approx. Time Counter: 192 - 242}

REP. PARKER asked Mr. Hedger whether, in light of Mr. Thueson's response to the last question, he still maintains that Montana is the only state which allows a person to sue outside of the CBA. **Mr. Hedger** responded that the Norris case involved whistle blowing which was outside of the CBA. He explained that HB 393 does not take away anyone's existing rights. He stated that the bill merely says that if your dispute arises out of your collective bargaining agreement, or involves the interpretation of your collective bargaining agreement, then your dispute is covered by the RLA and should be brought in that way.

{Tape: 3; Side: B; Approx. Time Counter: 243 - 268}

REP. PARKER posed whether the core analysis of Winslow was that the statutory cause of action is independent of rights under the collective bargaining agreement. **Mr. Hedger** stated that is what the Montana Supreme Court is saying, but his position is that the Court made an improper ruling. He emphasized that if it is covered under the CBA, the RLA preempts it; but if it is not covered under the CBA, then this bill does not affect the right to sue in court.

{Tape: 3; Side: B; Approx. Time Counter: 269 - 275}

REP. CLARK stated that he has a picture that the CBA is not the real problem; that the process, the investigation, and the fact-finding, is where the real problem lies. He asked about safeguards in Montana which would protect workers from retaliation. **Ms. Jacobson** responded that the premise and purpose of the fact-finding process is to get things settled as quickly as possible. She explained that both labor and management bring as much information as they can to the floor of the fact-finding. She stated that the employee has a union representative on board to speak and act on their behalf. She stated that there is a neutral person who asks questions and that the local representatives can join in as well.

{Tape: 3; Side: B; Approx. Time Counter: 276 - 363}

REP. CLARK commented about the awkwardness of resolving a dispute between labor and management. He asked Mr. Marceau about company policies regarding profit sharing. **Mr. Marceau** responded that on a railroad, many things affect the profit sharing plan such as derailments, chlorine spills, and run-away-engines. He stated that profit sharing was intended to be an incentive for employees to be more productive and efficient. He explained that profit sharing was never intended to be traded, or to reward companies for negligent mismanagement. **REP. CLARK** asked whether negotiations were going on at present to resolve this issue. **Mr. Marceau** offered his apology for taking the Committee's time on this continuing issue which appears, unresolved before the Committee, each session. He stated that he has extended a hand to Mr. Gruell in an attempt to resolve this issue. He stated that at the end of the last session, he told MRL that he felt it was unfortunate to have to bring these issues before the legislature.

{Tape: 3; Side: B; Approx. Time Counter: 364 - 438}

REP. CLARK asked about the taxpayers paying the brunt of the litigation expenses. **Ms. Jacobson** responded that under the RLA, arbitration is provided for at the end of the dispute-resolution

process if things cannot be resolved early on. She emphasized that the National Mediation Board bears the costs of arbitration under the RLA. She explained that allowing people to go to court after arbitration costs money. She stated that the idea in the 1930's was to pay for arbitration in order to relieve financial pressure on the smaller states.

{Tape: 3; Side: B; Approx. Time Counter: 439 - 481}

REP. CLARK stated it is obvious the unions do not like the current process. He stated that if the unions improve the process, management would drop their objections to the law. **Mr. Walsh** stated that the RLA is a difficult process to change. He believed that the process works well and that only a small minority have problems with the process. **John Gruell** stated that he just finished negotiating with the BLE and this issue did not come up because both sides are happy with the collective bargaining process. He added that the majority of people in the Brotherhood of Locomotive Engineers are happy with the process. He stated he respects Mr. Marceau but that the two of them are not in positions to negotiate with each other--that other officials would do that.

{Tape: 3; Side: B; Approx. Time Counter: 482 - 566}

REP. GALLUS asked how MRL obtained Mr. Winslow's medical records. **Mr. Cox** stated, as an aside, that there are contested issues on the Winslow case but how MRL got the medical records is one of them. He explained that because employees can be injured on the job and need medical treatment, they agree as part of the handling of insurance, to allow access to their medical records. He stated that the treating physician sent the medical records in the normal course of business and the records were not obtained pursuant to the discovery process. He emphasized that it is usual for an MRL employee to sign, as part of the process, a waiver of confidentiality. **REP. GALLUS** asked whether an employee would be penalized for refusing to sign a waiver to the confidentiality of the medical records. **Mr. Cox** stated it would be punitive in the sense that an employee would not get their medical claims taken care of.

{Tape: 3; Side: B; Approx. Time Counter: 567 - 640}

Mr. Thueson responded to **REP. GALLUS**'s question stating that MRL obtained the medical records, or at least called the treating physician, the day after Gary Winslow was injured. He explained that MRL approved Gary's claim as a work-related injury. However, three months later, MRL conducted an investigation stating that Gary Winslow falsified records and falsely claimed

his hernia was work-related. In the investigation, MRL did not talk to Gary Winslow's medical doctors, both of whom testified that his hernia was work-related. **Mr. Thueson** explained that MRL fired Mr. Winslow, and that is why Mr. Winslow sought a fair tribunal. **Mr. Thueson** stated that Mr. Winslow had a right to privacy of his medical information because he had a medical condition which did not affect his work.

{Tape: 3; Side: B; Approx. Time Counter: 641 - 672}

REP. RASER stated that she is troubled with this bill coming up so much. **Mr. Walsh** responded that Ms. Jacobson may be helpful in assisting labor and management with negotiations to settle this controversy.

{Tape: 3; Side: B; Approx. Time Counter: 673 - 741}

REP. GUTSCHE stated her intention to clarify three things. First, what remedy does the grievance process provide? **Mr. Theuson** responded it is for contractual matters. **REP. GUTSCHE** asked for what does 39-2-703 provide a remedy. **Mr. Theuson** responded for mismanagement, other than physical injury, such as losing your job. **REP. GUTSCHE** asked what FELA provides a remedy for. **Mr. Theuson** responded it only provides a remedy for physical injuries, and does not provide a remedy for losing your job or for the anguish and humiliation of being called a liar or a cheat. **REP. GUTSCHE** summarized that there are three different processes; three different remedies for what may be mutually exclusive problems. She asked whether any of the processes could be done away with. **Mr. Theuson** responded that all the processes have their purpose, and are necessary, within their own realm.

{Tape: 4; Side: A; Approx. Time Counter: 1 - 31}

REP. SALES asked about wages and the average length of employment. **Mr. Walsh** stated that out of 900 employees, 400 have been with the company since the beginning. He stated the average wage is \$45,000 a year. **REP. EVERETT** asked whether other railroads suffer these same sorts of problems. **Mr. Jensen explained** the disciplinary procedures of the different railroads. He stated he has heard about a lot of things such as intimidation but that he has never personally seen a lot of that.

{Tape: 4; Side: A; Approx. Time Counter: 32 - 101}

REP. NEWMAN asked why the miners had been dropped from the bill. **Mr. Ritter** responded that Butte no longer has a mine. **REP. NEWMAN** asked how many unions represented the 900 MRL employees. **Mr.**

Gruell responded that there are nine unions which MRL has CBA's with. **REP. NEWMAN** asked about current litigation. **Mr. Gruell** responded that in the last two years, six or seven cases have gone to arbitration; and approximately three to four a month are dealt with under the CBA's grievance procedure. He emphasized that most grievances are settled and do not go to arbitration.

{Tape: 4; Side: A; Approx. Time Counter: 102 - 194}

REP. NEWMAN asked Mr. Paoli about his representation of railroad employees. **Mr. Paoli** stated that attorneys for the employees are excluded from the grievance procedure process and civil litigation process in FELA claims. **REP. NEWMAN** stated that proponents testified that federal laws already protect railroad workers' rights. He asked Mr. Paoli whether he believes states can afford more protection than the federal government. **Mr. Paoli** responded that not only can states afford workers the rights which are not preempted by federal law, but that it is the state's absolute responsibility to give railroad employees more rights.

CHAIRMAN SHOCKLEY asked about the steps involved when a railroad employee breaks an ankle. **Ms. Jacobson** laid out the process as follows: She stated there would be an initial meeting at the fact-finding, with a 10 day notice. Both sides bring their facts and if they cannot resolve it, they appeal to a designated officer at an arbitration board. She emphasized that at all levels, employees have the right to bring a union representative. She explained that labor and management select neutral persons to arbitrate the case and that both sides may have counsel present. She emphasized that if the arbitration decision is not satisfactory, the worker can appeal the decision to federal court.

{Tape: 4; Side: A; Approx. Time Counter: 195 - 281}

Closing by Sponsor:

REP. NOENNIG closed on HB 393. He stated this bill only excludes claims which are already covered under the collective bargaining agreement of the RLA. He emphasized that there is not a definition of negligent mismanagement. He stated if there is a negligent mismanagement claim not covered in the grievance procedure of the collective bargaining agreement, then this bill would not affect that claim. He asserted that when an employee enters a binding arbitration agreement they give up their right to trial. He stated allowing a person to go both ways, to enter a collective bargaining agreement and sue in court, is not fair.

{Tape: 4; Side: A; Approx. Time Counter: 282 - 361}

HEARING ON HB 331

Sponsor: REP. STEVE GALLUS, HD 35, Butte

Opening Statement by Sponsor:

REP. GALLUS opened on HB 331. He stated that this bill would clarify the law regarding theft of rented or leased personal property. He explained that this bill would add a criminal offense to the Montana Code for not paying for rented equipment. He gave an example of a rented backhoe. He posed that the owner rents out the backhoe for a thousand dollars a week. A customer rents it for one week but keeps it for a month, sneaking it back without paying for the extra three weeks. He stated that under that scenario, the owner would lose \$3,000.

{Tape: 4; Side: A; Approx. Time Counter: 362 - 420}

REP. GALLUS stated he will propose the following amendments to the bill: Set a minimum amount of \$250. This would avoid applying this law to a person who forgets to return a video. He stated the second amendment would remove the felony language and that the third amendment is to add language to give courts the authority to order restitution.

{Tape: 4; Side: B; Approx. Time Counter: 192 - 220}

Proponents' Testimony:

Kevin Pearson, Stroebel Rentals, Great Falls, supported HB 331. He stated that this bill is not for a late drill but for those situations like REP. GALLUS gave in his opening. He stated he has over \$25,000 owed to him for equipment. He stated that a \$125,000 piece of equipment only lives so long. He emphasized that people are paying for the wear and tear of the equipment. He urged a do pass.

{Tape: 4; Side: B; Approx. Time Counter: 221 - 256}

Patty Scott, East Helena, East Helena Rental, supported HB 331. She stated this bill would put some teeth into existing law by adding language for a person's failure to pay.

{Tape: 4; Side: B; Approx. Time Counter: 257 - 284}

Clyde Funk, High Country Rental, Livingston, supported HB 331. He stated this bill would help the businesses and the county attorneys.

{Tape: 4; Side: B; Approx. Time Counter: 285 - 293}

Doug Hanson, A-1 Rentals, Billings, supported HB 331. He spoke about the problem with sending certified letters. They have to wait three days and then it may take two or three weeks for an undeliverable letter to get back.

{Tape: 4; Side: B; Approx. Time Counter: 294 - 311}

Mathew Kleg, East Gate Party Center and Rental, East Helena, supported HB 331. He stated that the certified letter process does not work. He stated that he is currently involved in a small claims court with a contractor who did not pay his rental bill. He stated that this has been going on for six months. He felt that some people come in knowing they have no intention to pay their bill.

{Tape: 4; Side: B; Approx. Time Counter: 312 - 335}

Gary Baxter, Yellowstone Rental, Yellowstone, supported HB 331. He stated that he rents out snowmobiles and that most of his renters are from out-of-state. He explained that the 72-hour rule makes it impossible for him to collect as they are long gone.

{Tape: 4; Side: B; Approx. Time Counter: 358 - 361}

Brad Griffin, Montana Equipment Dealers, supported HB 331.

Roland Schumacher, ABC Rental, Bozeman, supported HB 331. He stated this bill would only modify existing language. He believes that non-payment of rental equipment is a crime. He stated that losing income hurts the business and they are beyond worrying about the drills and the sawzaws.

Carl Schweitzer, Montana Rental Association, supported HB 331. He explained that he is not opposed to REP. GALLUS' amendments. He stated that the current law requiring the certified letter has been a hindrance.

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

The Committee asked about whether the amendments to make it a misdemeanor as opposed to a felony is a good idea. **Mr. Schweitzer** stated that would be a good idea. **REP. SHOCKLEY** asked Mr. Schweitzer whether he knew he could put a lien on the contractor. Mr. Schweitzer responded that this particular contractor set him up. **REP. HARRIS** asked Mr. Schumacher whether his insurance policy would cover his loss as theft. **Mr. Schumacher** responded that his insurance would cover the loss if the property was never returned but not for non-payment.

{Tape: 4; Side: B; Approx. Time Counter: 362 - 553}

Closing by Sponsor:

REP. GALLUS closed on HB 331. He asked the Committee to support this bill.

{Tape: 4; Side: B; Approx. Time Counter: 554 - 651}

ADJOURNMENT

Adjournment: 12 P.M.

REP. JIM SHOCKLEY, Chairman

LISA SWANSON, Secretary

JS/LS

EXHIBIT (juh20aad)